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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 492

McFADDIN EXPRESS, INCORPORATED, L & L LEASING CORPORATION and LOUIS DeBERADINIS, JR.,
Petitioners,

—v—

THE ADLEY CORPORATION; MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY and DANIEL J. ADLEY,

and

UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Introduction

The respondents, The Adley Corporation, Michael L. Adley, Donald A. Adley, Ralph J. Adley and Daniel J. Adley, oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 7, 1965.

Opinions Below

The opinion of the United States District Court for the District of Connecticut (App. Petitioners' Brief, p. 15), is reported at 240 F. Supp. 791. The opinion of the court of appeals (App. Petitioners' Brief, p. 7) is reported at 346 F. 2d 424.

Jurisdiction

The judgment of the Court of Appeals was entered on June 7, 1965. The petitioners invoked jurisdiction of this Court under 28 U.S.C. §1254(1).

Questions Presented

The respondent, The Adley Corporation, entered into two contracts with petitioner-corporations, McFaddin Express, Incorporated, a motor carrier holding a certificate from the Interstate Commerce Commission, and L & L Leasing Corporation which leased equipment to it. The first provided for the sale of all stock of the two corporations to The Adley Corporation (also a certificated motor carrier) subject to an audit to verify the consolidated balance sheet of the two petitioner-corporations. The second contract provided for temporary management and control of McFaddin Express, Incorporated, and L & L Leasing Corporation by The Adley Corporation for a period of one hundred eighty (180) days from the effective date of an order of the ICC authorizing the contract "or to such earlier or later date as shall be ordered by said Commission, and unless other-

wise ordered by said Commission until a final order is made by said Commission" with regard to the sale.

The questions presented by the petition for certiorari are:

1. The petitioners claim that they are trying to enforce an "order" of the Interstate Commerce Commission approving the contract for temporary management. Was the approval of the contract for temporary management and control an "order" of the Interstate Commerce Commission?

2. In view of the fact that the contracts for the sale of stock and for temporary management and control were between two carriers holding certificates from the Interstate Commerce Commission, should "federal principles control the disposition of the claim," or (as held by the District Court and the Circuit Court) are the contracts governed by state law applicable to similar contracts relating to businesses not under federal regulation?

Statement of the Case

The respondents adopt the factual summary at the beginning of Judge Friendly's opinion (346 F.2d 424-5):

> "In this action in the District Court for Connecticut between citizens of that state, plaintiffs sought to establish federal question jurisdiction under various sections of the Judicial Code, notably 28 U.S.C. §§1331, 1336, and 1337, see also 49 U.S.C. §16 (12). Judge Blumenfeld, in a well-reasoned opinion, 240 F.Supp. 791 (1965), de-

cided that the effort had not succeeded and dismissed the complaint. We agree with his disposition.

"The complaint alleged the making of two contracts as of April 20, 1959, relating to McFaddin Express, Incorporated, a motor carrier holding a certificate from the Interstate Commerce Commission, and L & L Leasing Corporation, which leased equipment to it. One contract provided for the sale of all the stock of the two corporations to The Adley Corporation, also a certificated motor carrier; the other provided for temporary management and control of McFaddin and L & L by Adley for a period of 180 days from the effective date of an order of the ICC authorizing the contract 'or to such earlier or later date as shall be ordered by said Commission, and unless otherwise ordered by said Commission until a final order is made by said Commission' with regard to the sale. The contract of sale was subject to ICC approval of the management contract in accordance with 49 U.S.C. §310a(b), and ultimate approval of the sale itself as required by 49 U.S.C. §5. Appropriate applications were made to the ICC which, on May 21, 1959, issued an order, later extended, approving the temporary management contract. Serious disagreements occurred between the parties, federal tax liens on McFaddin's property were foreclosed, and McFaddin's service became largely dormant. In a report dated Oct. 15, 1963, the ICC denied approval, 93 M.C.C. 378, and the management contract terminated in August, 1964.

"The complaint charged, *inter alia*, that during the term of the management contract the defendants failed to pay current federal taxes and to comply with an agreement McFaddin had made for the discharge of past delinquencies; that at the time the contracts were made, defendants did not intend to comply with them in good faith; that they had mismanaged McFaddin and L & L, both deliberately and negligently, had diverted the former's business to their own account, had induced creditors to repossess assets of McFaddin, had appropriated assets of McFaddin and L & L, had terminated the employment of McFaddin's employees and hired some of them for Adley, had failed to segregate revenues or funds belonging to McFaddin and L & L, and had failed on the expiration of the management contract to return the property and business of McFaddin and L & L as the contract required. The first count of the complaint alleged in conclusory terms that the mismanagement and return of the corporations in their damaged state violated the ICC order approving the management contract. Reasserting the same facts, further counts set forth theories of fraud, constructive trust, and breach of contract. Damages and certain equitable relief were requested."

ARGUMENT

I.

There is no order of the Interstate Commerce Commission to be enforced.

As pointed out in the opinion of the Court of Appeals for the Second Circuit (346 F.2d 424, 425—App. to Petitioners' Brief, p. 9) the Interstate Commerce Commission by report dated Oct. 15, 1963, denied approval of the sale, 93 M.C.C. 378. The contract for temporary management and control terminated in August 1964. The authorization for temporary control was "upon the terms and conditions set forth in the agreement filed with the application." The contract for temporary management and control provided by its terms that it was to continue only "until a final order is made by said Commission" with regard to the sale (C.C.A. Opinion, p. 425—App. to Petitioners' Brief, p. 8).

When the Interstate Commerce Commission denied approval of the sale, the previous permission by which it "authorized" temporary control until the final decision was made automatically terminated. There is no order for sale to be enforced. There is no order for temporary management and control to be enforced.

In passing, it should be noted that the Commission ruled that it was not a part of its function to resolve differences among the parties, stating, 87 M.C.C. 665 (1961):

". . . it is well established by Commission precedent that matters of controversy arising between the parties under private contracts must be left for settlement by the parties themselves or by the courts."

The Commission repeated this position, 93 M.C.C. at 382. The Commission's actions are noted in footnote 1 of the Second Circuit opinion (supra) at 425 (App. Petitioners' Brief, p. 9).

II.

Claims of the petitioners arise under state law.

The claims of the petitioners arise under state law even though the contracts required ICC approval to be carried out. In this regard the District Court (Blumenfeld, *J.*) 240 F.Supp. 791, said:

". . . In all of its essential features the case made by the plaintiffs' complaint is based upon contracts negotiated at arms length in the open market, and they owed nothing to federal legislation. Every question which is raised depends for decision upon conventional local or general common law concepts and doctrines of damages applicable in suits to enforce purely private rights. In construing the contracts, it might be found expedient or even necessary to refer to or consult the statutes upon which the applications to the ICC for permission to merge and to temporarily operate McFaddin were based, which are referred to in the complaint, and with some refer-

ence to which the contracts appear to have been executed. But, as stated in *St. Paul, M. & M. Ry.* v. *St. Paul & No. Pac. R.R.*, 68 Fed. 2, 13 (8th Cir. 1895), *aff'd by consent*, 18 S.Ct. 946, 42 L.Ed. 1212 (1897), where a similar issue of federal question jurisdiction was decided adversely to the plaintiff—

> '[A]fter all, the point at issue upon this branch of the case is the true construction of that agreement, and that is clearly a question of general and local law, inasmuch as the right asserted by the plaintiff depends upon that agreement, and the local statute by which it was adopted and confirmed. A case does not become one of federal cognizance because it may be found necessary, in construing a private contract or a local law from which the rights of the respective parties are derived, to consult some federal statute with a view of ascertaining the meaning of the contract or the scope and effect of the local law. In such cases the cause of action or the defense, as the case may be, is not founded on a law of the United States in any such sense as to bring the suit within the jurisdiction of the federal courts'."

As Judge Friendly phrased it for the Second Circuit (p. 427):

> ". . . we cannot find that plaintiffs have here shown that federal principles should supersede state law in any respect relevant to this case. That the contracts could not lawfully be carried out save with ICC approval does not, without more,

demonstrate that Congress meant all aspects of their performance or non-performance to be governed by law to be fashioned by federal courts rather than by the state law applicable to similar contracts relating to businesses not under federal regulation. . . ."

The opinion of the Second Circuit cited its recent decision of *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823. The facts of that case showed that there had been assignments of rights in renewal copyrights and the purported sole owner had recorded an instrument in the Copyright Office purporting to be an assignment of renewal copyrights. There was no diversity of citizenship. Citing a long line of Supreme Court cases, the opinion held that the critical issue involved was whether the defendant-assignor had made a prior assignment. The real question was the title to the copyrights. In deciding that this was a question of local law, the opinion at p. 826 said:

". . . To take one of many examples, the Court said in *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473, 478, 32 S.Ct. 238, 239, 56 L.Ed. 513 (1912):

'The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. For courts of a state may try questions of title, and may construe and enforce contracts relating to patents. Wade v. Lawder, 165 U.S. 624, 627, 41 L.Ed. 852, 17 Sup.Ct.Rep. 425.'

"Just as with western land titles, the federal grant of a patent or copyright has not been thought to

> infuse with any national interest a dispute as to ownership or contractual enforcement turning on the facts or on ordinary principles of contract law. . . ."

Pan American P. Corp. v. *Superior Court*, 366 U.S. 656, 6 L.Ed. 2d 584, 81 S.Ct. 1303—A natural gas pipeline company had a contract with two natural gas producers for transportation in interstate commerce. The Kansas Corporation Commission ordered it to pay a higher price for the gas than was stipulated in the contract. It paid the higher price under protest; it challenged the validity of the order and the order was later held invalid. It then sued in the Superior Court of Delaware to recover the overpayments, claiming alleged contracts to refund the overpayments in the event that the order should be held invalid, and also claiming restitution of the overpayments on the ground of unjust enrichment.

The producers claimed that the state court lacked jurisdiction because under the Natural Gas Act the prices to be paid must be in accordance with the rates filed with the Federal Power Commission. The producers petitioned the Supreme Court of Delaware for a writ of prohibition to prevent further proceedings before the Superior Court. The petition was denied. The Supreme Court of the United States affirmed, with Justice Frankfurter writing for a unanimous court. The following appears in 6 L.Ed.2d 584, 589-90:

> "But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal

law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 57 L.ed. 716, 717, 33 S.Ct. 410, the complaints in the Delaware Superior Court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum-rate order was invalid, or for restitution of the overpayments by which petitioners have allegedly been unjustly enriched under the compulsion of the invalid Kansas order. No right is asserted under the Natural Gas Act.

"The suits are thus based upon claims of right arising under state, not federal, law. It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, e.g., *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672, 94 L.ed. 1194, 1200, 70 S.Ct. 876, and cases cited. Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .' *Gully* v. *First Nat. Bank*, 299 U.S. 109, 112, 113, 81 L.ed. 70-72, 57 S.Ct. 96.

* * * *

"The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in *Gully* v. *First Nat. Bank,* 299 U.S., at 116, is apposite:

> 'We recur to the test announced in *Puerto Rico* v. *Russell & Co.,* supra: "The federal nature of the right to be established is decisive—not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co.* v. *Mottley,* supra. With no greater reason can it be said to arise thereunder because permitted thereby.'

"We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.

"Nor does §22 of the Natural Gas Act help petitioners. 'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdic-

tion, not the generator of jurisdiction because of which state courts are excluded. This was settled long ago in *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U.S. 255, 42 L.ed. 458, 18 S.Ct. 62, a case involving a grant of exclusive jurisdiction to the federal courts in all cases arising under the patent laws. Suit was brought in a state court on a common-law contract claim. The complaint contained no mention of a patent, but the invalidity of certain patents was set up in defense. In response to the argument that this deprived the state courts of jurisdiction, the Court said:

> 'Section 711 [the jurisdictional provision] does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of "*cases*" arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.' (Emphasis in the original.) 168 U.S., at 259.

"Petitioners contend that to permit the state courts to entertain the suits brought by Cities Services will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remem-

bered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. . . ."

Conclusion

1. There is no order of the ICC to be enforced. The ICC has so held and its opinion was confirmed by both the District and Circuit Courts.

2. There is no federally created right which forms an essential element of the petitioners' cause of action and federal principles do not control the disposition of the claim. The rights under the contracts are subject to adjudication in the state courts.

For the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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